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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ANDRE L. BRYANT, Defendant and Appellant.	A128827 (San Francisco City & County Super. Ct. No. 211174; 2442707)

Following a jury trial, defendant Andre L. Bryant was convicted of assault with a deadly weapon and battery causing serious bodily injury, with enhancements. He was sentenced to a six-year prison term. On appeal, defendant contends the trial court's omission of a paragraph of oral jury instructions requires his convictions be reversed. In the alternative, he maintains the matter must be remanded to the trial court for resentencing due to the court's failure to exercise its discretion in determining whether he was eligible for probation. We find no prejudicial instructional or sentencing error, and affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged with one count of assault with a deadly weapon (Pen. Code,[1] § 245, subd. (a)(1)) and one count of battery with serious bodily injury (§ 243, subd. (d)). The assault count alleged an enhancement for great bodily injury (§ 12022.7, subd. (a)) and the battery count alleged an enhancement for the use of a deadly weapon

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

(§12022, subd. (b)(1)). The jury found him guilty on both counts and found both enhancements true. The trial court imposed a three-year prison term for assault with a deadly weapon and a consecutive term of three years for the great bodily injury enhancement. Sentence was stayed for the battery count and the enhancement for the use of a deadly weapon pursuant to section 654.

A. *Prosecution Case*

Witness Sarah Lefton observed two men—one Black and the other Latino—engaged in a heated discussion as she walked into Precita Park on October 28, 2009. She did not see the Latino male, later identified as Antonio Arellano, engage in any physically aggressive conduct such as pushing, shoving, kicking, or throwing a punch at the other man, whom she later identified as defendant. After passing the men, Lefton heard a thud and turned to see defendant strike Arellano twice in the head area with what she described as a pole or a branch.[2] At no time did Lefton see anything indicating defendant was acting in self-defense. Lefton testified defendant calmly and collectedly walked away from the victim after striking the last blow. On a scale of "soft to moderate to hard to very hard," Lefton described the blows she witnessed as hard.

Witness Michael Goodrich had just sat down in his truck and was reading the newspaper when he heard a woman yelling, "Stop it. Stop it," and saw defendant, 15 feet away, swing at Arellano three times with what appeared to be a four-foot length of plastic pipe. He first noticed Arellano with his arm raised in a defensive position, and defendant swinging the pipe at him. He saw defendant swing once at Arellano when his arm was up, a second time at Arellano's leg and a third time at his head "from . . . over the top" after Arellano had fallen to the ground and was lying on his back. Goodrich had not seen or heard anything unusual, such as an argument or a fight, before seeing defendant hit the victim. He did not see Arellano taking any aggressive actions toward defendant, nor did he see any conduct by defendant that seemed defensive in nature. Using the same

[2] After defendant was apprehended, this weapon was identified as a three-foot-long wood pole, approximately three inches in diameter.

standard as Lefton, Goodrich described the blows he witnessed as hard. After the altercation, defendant collected his belongings and calmly walked away. Goodrich approached Arellano and observed he was bleeding and unconscious.

Michelle Foy was standing across the street from the park when she saw defendant hit Arellano with what she believed was a baseball bat or a piece of wood, causing him to fall to the ground. She did not see anything that occurred before defendant knocked Arellano to the ground. Foy categorized the blow she witnessed as hard. Concerned for the well-being of the victim, Foy entered a local cafe, dialed 911, and reported the incident.

The paramedic who treated Arellano at the scene reported he lost consciousness as a result of the beating. Arellano also suffered blunt force trauma to his face, bruising and swelling around his eyes, and multiple facial fractures. The emergency room physician who treated Arellano, Dr. Alan Gelb, testified Arellano's injuries were severe and substantial, would take six to eight weeks to heal, and were severe enough surgery might have been required.[3] On cross-examination, Dr. Gelb testified the injuries to the left side of Arellano's face could have been the result of one blow. He opined it was "remotely possible" the injuries to the right side of Arellano's face could have resulted from the same blow as the injuries to the left side, but also emphasized he was not a forensic pathologist.

B. *Defense Case*

Defendant testified he was lying down in Precita Park when Arellano, who was sitting on a bench with another man, called him over and asked him if he was Fidel Castro. Arellano made a fist and defendant walked away from the bench. Arellano then called defendant again. Defendant turned and saw Arellano approach. When Arellano

[3] Arellano never returned to the hospital for follow-up treatment and did not testify at the trial.

reached defendant, he raised his fists in a fighting stance.[4] Believing Arellano intended to hit him, defendant struck him in the knee with a stick he was carrying. As Arellano grabbed his knee, defendant then struck him in the face. Defendant acknowledged both the blows to the knee and to the head came from hard swings. After Arellano fell down, defendant testified he did not hit him again but instead walked away.

C. *Rebuttal*

Defendant was apprehended a few minutes after the incident. Immediately after handcuffing defendant, San Francisco Police Officer Duncan Duffin asked him "what happened." In responding to Officer Duffin, defendant admitted to striking the victim in the knees and the face with a stick but never mentioned any aggressive behavior by the victim such as the victim coming at him in a fighting stance or attempting to kick him.

II. DISCUSSION

A. *Omitted Oral Jury Instruction*

1. *Facts*

Following the close of evidence, the trial court orally instructed the jury on the right to self-defense within the meaning of CALCRIM No. 3470. The following was included in these oral instructions: "Self-defense is a defense to both of the charged counts. [¶] Mr. Bryant is not guilty of those crimes if he used force against the other person in lawful self-defense. [¶] The defendant acted in lawful self-defense if, one, he reasonably believed that he was in eminent danger of suffering bodily injury; two, he reasonably believed that the immediate use of force was necessary to defend against that danger; and three, he used no more force than was reasonably necessary to defend against that danger. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. [¶] The defendant must have believed there was eminent [*sic*] danger of violence to himself. The defendant's belief must have been reasonable, and he must have acted because of that belief. [¶] The defendant is only entitled to use that

[4] Defendant also claims Arellano attempted to kick him at some point before he hit him with the stick, but it was not clear from his testimony when the attempted kick occurred.

amount of force that a reasonable person would believe is necessary in the same situation. [¶] If the defendant used more force than was reasonable, he did not act in lawful self-defense. [¶] When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. [¶] If the defendant's beliefs were reasonable, the danger does not need to have actually existed. [¶] A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself, and if reasonably necessary, to pursue an assailant until the danger of death or great bodily injury has passed. This is so even if safety could have been achieved by retreating." The trial court failed to read aloud the following additional paragraph of CALCRIM No. 3470: "The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. If the People have not met this burden, you must find the defendant not guilty of both charges."

Although this paragraph was included in the written instructions given to the jury, defendant claims its omission from the court's oral instructions requires the judgment be reversed.

2. *Analysis*

Minor discrepancies between written and oral instructions do not constitute reversible error. (*People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107; see also *People v. Osband* (1996) 13 Cal.4th 622, 687; *People v. Crittenden* (1994) 9 Cal.4th 83, 138–139.) Here, however, the omitted oral instruction concerned the prosecution's constitutional burden of proof with respect to the central issue in the case—whether defendant acted in of self-defense. The absence of self-defense was an element of both offenses charged against him. We assume without deciding that the complete omission of *any* oral instruction allocating the burden of proof as to an element of the offense would not be cured by giving the jury a set of written instructions covering the issue. (See, e.g., *People of the Territory of Guam v. Marquez* (9th Cir. 1992) 963 F.2d 1311, 1314–1315 [error to

fail to orally instruct on elements of the crime]; *United States v. Noble* (3d Cir. 1946) 155 F.2d 315, 318 [same].) However, that is not the case we have before us.

The oral instructions given by the trial court in this case did make it clear it was the prosecution's burden to prove beyond a reasonable doubt defendant did not act in self-defense. The trial court orally instructed the jury to "[p]ay careful attention to all of the instructions and consider them together." The court further instructed: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove the defendant guilty beyond a reasonable doubt. [¶] *Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt*. [¶] . . . [¶] Unless the evidence proves Mr. Bryant guilty beyond a reasonable doubt, he is entitled to an acquittal, and you must find him not guilty." (Italics added.) With respect to the assault with a deadly weapon count, the court orally instructed the jury, "the People must prove" each of the five elements of the offense, including the fifth element, "the defendant did not act in self-defense." As to the battery count, the court orally instructed "the People must prove" each of three elements, including that "Mr. Bryant did not act in self-defense."

" 'It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.] "[T]he fact that the necessary elements of a jury charge are to be found in two instructions rather than in one instruction does not, in itself, make the charge prejudicial." [Citation.] "The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." ' " (*People v. Bolin* (1998) 18 Cal.4th 297, 328, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 538–539.) In our view, the oral instructions given—in their totality—were correct and complete as to the prosecution's burden of proving the absence of self-defense in connection with both offenses charged.

Even if we assume error in the incomplete reading of CALCRIM No. 3470, we find such error harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) "[T]he relevant inquiry for

determining federal constitutional error is whether, in light of the totality of the circumstances, including all the instructions given to the jury, the arguments of counsel and weight of the evidence, the omission of the instruction deprived defendant of a constitutionally fair trial." (*People v. Mayo* (2006) 140 Cal.App.4th 535, 543.) We note at the outset an omission, or incomplete instruction, is less likely to be prejudicial than a misstatement of the law. (*Henderson v. Kibbe* (1977) 431 U.S. 145, 155.)

In addition to the other oral instructions given by the court concerning the prosecution's burden of proof, as quoted above, the court also provided jurors with three copies of written instructions containing the two sentences of CALCRM No. 3470 it inadvertently omitted from its oral recitation of the instructions. The court invited jurors to refer to the written instructions during its deliberations. It informed jurors at the outset of its oral instructions, "The law requires that I read the instructions to you. I will give you several copies of the instructions *to use in the jury room*." (Italics added.) The court referenced the written instructions again just before releasing the jury to begin deliberations. Under the circumstances, we may presume the jury was guided in its deliberations by the more complete written instructions, which the court orally admonished it to consult in the jury room. (*People v. Osband*, *supra*, 13 Cal.4th at p. 687; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 138; *People v. Garceau* (1993) 6 Cal.4th 140, 189–190, overruled on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

The arguments of both counsel reinforced the court's oral and written instruction as to the prosecution's burden of negating self-defense. Defense counsel stressed unequivocally to the jury in her closing argument the burden of proof as to self-defense rested with prosecution: "[I]t's not [defendant's] job to prove to you that he acted in self-defense. It's [the prosecutor's] job to prove to you beyond a reasonable doubt that he did not act in self-defense. [¶] [The prosecutor] can't say he might have acted in self-defense, he might not have acted in self-defense. Probably this, maybe that. He has to prove to you beyond a reasonable doubt that this was not self-defense." The prosecutor for his part acknowledged his burden of proof each time he addressed the jury. In his opening

statement, he told jurors, "And at the end of the day, the testimony that comes in beyond a reasonable doubt, will prove that the victim was not engaged in an act of trying to punch, trying to kick, trying to stab, shoot, or harm, Mr. Bryant. And based on that evidence, I'll ask you to return a verdict with regard to both counts." In his closing argument, he stated, "A claim that someone put up their fists that has never been heard until it is testified to by the defendant from the witness stand is hardly a capable, competent claim of self-defense which would rise to a reasonable doubt." In his rebuttal argument, he argued the eyewitness testimony "standing alone in and of itself . . . shows beyond a reasonable doubt that the defendant was not acting in lawful self-defense." The arguments of counsel underline that defendant was not prejudiced by the incomplete oral instruction on self-defense. (*People v. Chavez* (1985) 39 Cal.3d 823, 831 [where both the prosecution and defense jury arguments proceeded on the premise corroboration was needed, the jury was not misled as to the need for corroboration and no prejudice resulted, notwithstanding an erroneous instruction on the subject]; see also *People v. Moore* (1988) 47 Cal.3d 63, 87–89; *People v. Kelly* (1992) 1 Cal.4th 495, 526.)

The evidence of defendant's guilt was also overwhelming. "In analyzing the prejudicial effect of a constitutional instructional error, we may consider the fact that the evidence and proof of guilt concerning the omitted element is overwhelming, uncontradicted, or dispositive." (*People v. Avila* (1995) 35 Cal.App.4th 642, 663.) In the present case, there were three disinterested eyewitnesses to the assault. None saw the victim take any aggressive stance or action toward defendant before defendant attacked him, or observed any weapon in the victim's hand or in his vicinity after he had been knocked unconscious. Only the defendant possessed or used a deadly weapon. The witnesses saw defendant deliver at least one if not two blows to the victim's head *after* he was lying incapacitated on the ground, and the victim's physical injuries—a broken jaw and fractured eye socket—were consistent with two hard blows to the head and went far beyond any threat Arellano could have posed. Defendant's claim of self-defense, on the other hand, emerged for the first time when he took the witness stand at trial. It was not corroborated by any evidence. The claim was undermined not only by defendant's

obvious motive to lie, but by his conduct and statements before he had an opportunity to fabricate or knew the victim would not be available to testify—his calm and deliberate exit from the scene immediately after knocking Arellano unconscious, and his failure to make any exculpatory statement to Officer Duffin upon his arrest. As the prosecutor argued to the jury, if Arellano had in fact been the aggressor it is highly unlikely defendant would not have attempted to explain his actions to Officer Duffin.

Finally, the record is devoid of any indication the jury was confused or misled about the prosecution's burden of proof with regard to self-defense, or that defense counsel was concerned about the potential effect of the omitted oral instruction. (See *People v. Famalaro* (2011) 52 Cal.4th 1, 42.)

Considering the instructions as a whole, including both the oral and written instructions given to the jury, as well as the arguments of counsel, the weight of the evidence, and the absence of any indication the jury was confused or misled by the two sentences omitted from the court's oral instructions, we find the omission was harmless beyond a reasonable doubt.

B. *Denial of Probation*

Defendant seeks a remand for resentencing, contending the record shows the trial court erroneously believed it had no discretion to place him on probation. In the alternative, he contends his trial counsel rendered ineffective assistance by failing to object to the trial court's erroneous statement at the sentencing hearing that he was ineligible for probation, and by misinforming the court about defendant's probation eligibility in her written statement of mitigating factors.

1. *Facts*

In its report and recommendation to the court, the probation department opposed probation, explaining its reasons as follows: "During the interview, Mr. Bryant has not shown any remorse for his actions. The defendant appears to lack . . . empathy as to the severity of the victim's injuries. . . . Mr. Bryant contends that he is not responsible for the injury endured by the victim because the victim attacked him. Contrary to his contention, the police report indicates that one of the witnesses observed the victim in a defensive

stance. The defendant's behavior makes him a poor candidate for probation supervision. Based on Mr. Bryant's violent conduct, he is a serious danger to society."

In addition, the probation report found the following circumstances in aggravation under California Rules of Court, rule 4.421: (1) the crime involved great violence, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; (2) defendant used a weapon at the time of the commission of the crime; and (3) defendant has engaged in violent conduct that indicates a serious danger to society. In mitigation, it found under California Rules of Court, rule 4.423, defendant has an insignificant record of prior criminal conduct. The report noted "theft related offenses in San Francisco and a warrant for a burglary in New York," but no known convictions in defendant's record.

Defense counsel submitted a written statement in mitigation arguing the following circumstances: (1) the victim initiated the events leading to his injury; (2) defendant testified he felt threatened by the victim and acted in self-defense; (3) defendant has an insignificant record of criminal conduct; (4) "Mr. Bryant is ineligible for probation. However, but for that ineligibility he would be given probation"; (5) the victim was released from the hospital the same day he was admitted; (6) the victim was not "particularly vulnerable" because he was with another man; and (7) defendant's acts were not planned or sophisticated.

At the sentencing hearing, defense counsel argued against the probation officer's view the crimes involved a high degree of cruelty and defendant posed a danger to society. She further argued defendant's belief he was acting in self-defense explains any perceived lack of remorse. Defense counsel did not argue for probation. She asked the court to strike the enhancements and impose a mitigated state prison term.

The trial court imposed a state prison sentence of six years, stating as follows: "Okay. Probation is denied because Mr. Bryant is ineligible for probation. With respect to the circumstances in aggravation, it is clear, given the nature of the jury finding, that the crime involved great violence and that they found the great bodily injury enhancement to be true; and so the circumstances in aggravation pursuant to California

Rule[s] of Court[,] rule 4.421(a)(1) does apply. [¶] There was also a finding by the jury that he used a weapon at the time of the commission of the crime, and therefore rule 4.421(a)(2) applies. [¶] And I don't think it's too much of a stretch to suggest that both of those jury findings support the finding that he engaged in violent conduct that indicates a serious danger to society pursuant to rule 4.421(b)(1). So I do believe that the circumstances in aggravation set out in the probation report apply and that they are supported by the finding of the jury. So I don't think there is any kind of *Cunningham* [*v. California* (2007) 549 U.S. 270] issue. [¶] It is correct that Mr. Bryant has no prior record that I'm aware of, so that qualifies as a factor in mitigation under rule 4.423(b)(1), and I am going [to] impose the following sentence. [¶] I am going [to] impose with respect to count I, a violation of Penal Code section 245, the midterm of three years. [¶] The allegation associated with that is the great bodily injury allegation. And on that I am going to impose a consecutive three years for a total prison term of six years." The trial court went on to impose a midterm sentence of 36 months on count II with a one-year enhancement, and stayed both of these additional sentences pursuant to section 654.

2. *Analysis*

Defendant does not dispute he was presumptively ineligible for probation under section 1203, subdivision (e) (hereafter section 1203(e)), which provides in pertinent part as follows: "Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: [¶] . . . [¶] (2) Any person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted. [¶] (3) Any person who willfully inflicted great bodily injury . . . in the perpetration of the crime of which he or she has been convicted."

The statutory terms, " 'unusual cases' " and " 'interests of justice,' " are narrowly construed. They are limited to cases in which the crime is either atypical or the offender's moral blameworthiness is reduced compared to other offenses having the same general characteristic—such as the use of a deadly weapon or the infliction of great bodily injury—that would subject them to the probation limitation of section 1203(e).

(*People v. Superior Court* (*Dorsey*) (1996) 50 Cal.App.4th 1216, 1229.) California Rules of Court, rule 4.413(c) lists the facts or circumstances which may indicate the existence of an unusual case in which probation can be granted if it is otherwise found to be appropriate under rule 4.414—the rule applicable to probation-eligible defendants. Although rule 4.414 allows consideration of the defendant's prior criminal record, rule 4.413 generally does not take the lack of a prior record into account, with two narrow exceptions. Rule 4.413 focuses instead on the nature of the crime and of the degree of the defendant's culpability in committing it. The defendant's prior record is relevant to determining probation eligibility if the defendant is "youthful or aged," or if the defendant participated in the crime under "circumstances of great provocation, coercion, or duress not amounting to a defense." (Cal. Rules of Court, rule 4.413(c)(1), (c)(2)(A) & (C).) Neither exception applies here. Defendant was a 28-year-old adult at the time of sentencing. He was neither youthful nor aged. Unless an argument about Fidel Castro is a "great provocation," there are also no facts here making defendant's lack of a record of violent crimes relevant under rule 4.413(c)(2)(A).

Thus, the only factor listed in California Rules of Court, rule 4.413 even potentially relevant to this case was whether defendant's use of a deadly weapon or infliction of great bodily injury on the victim was "substantially less serious" than in typical cases involving the use of a deadly weapon or the infliction of great bodily injury on the victim. (Cal. Rules of Court, rule 4.413(c)(1)(A).) It is noteworthy defendant does not cite or discuss rule 4.413 on this appeal, nor make any argument his crime was substantially less serious than the typical attack with a deadly weapon causing great bodily injury.[5] Given the weapon used and the extent of the victim's injuries in this case, such a claim cannot be supported on this record.

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[5] The closest he comes is the assertion that because the victim's "facial injuries were consistent with a single blow," the crime was not "particularly vicious or callous." The viciousness or callousness of the crime is an enumerated factor in aggravation for purposes of determining the choice of prison term under California Rules of Court, rule 4.421. It is not mentioned in rule 4.413. In any event, defendant mischaracterizes the forensic evidence. The victim's treating physician testified the victim's fractures on the

We are not aware of any other fact or circumstance not specifically mentioned in California Rules of Court, rule 4.413(c)(1) or (c)(2) that would make this an unusual case, nor did defendant offer any argument such a fact or circumstance existed, either here or in the trial court. Therefore, we have no basis to conclude the trial court actually had any discretion to consider probation as an alternative to a prison sentence under section 1203(e) and rule 4.414. This may account for the candid acknowledgement in defendant's written statement in mitigation that he was "ineligible for probation," and trial counsel's lack of objection when the trial court stated defendant was ineligible for probation at the outset of its oral pronouncement of sentence.

Furthermore, the record before us fails to establish the court was unaware of its discretion under section 1203(e) to find, in a proper case, the presumption of probation ineligibility was overcome. The trial court was not required to state any reason for finding defendant ineligible for probation under that provision. California Rules of Court, rule 4.406 enumerates all of the circumstances in which reasons for a sentencing decision must be stated on the record. A finding of probation ineligibility under section 1203(e) is not one of those circumstances. It was sufficient under rule 4.406 for the court to simply state it was denying probation or imposing a prison sentence "because Mr. Bryant is ineligible for probation." (Cal. Rules of Court, rule 4.406(b)(2); see also *People v. Langevin* (1984) 155 Cal.App.3d 520, 523 [no need for court to state it was rejecting mitigating factors under § 1203(e)].) "[R]emand [for resentencing] is unnecessary if the record is silent concerning whether the trial court misunderstood its sentencing discretion. Error may not be presumed from a silent record." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1229.) " '[A] trial court is presumed to have been aware of and followed the applicable law.' " (*People v. Martinez* (1998) 65 Cal.App.4th

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left side of his head could all have been caused by one blow, but it was only "remotely possible" the fracture on the right side was caused by the same blow. Even if we accept defendant's claim he did not attack his victim in the most vicious or callous fashion imaginable, that is different from a claim his crime was "substantially less serious" than a typical assault with the use of a deadly weapon.

1511, 1517.) The record's silence here affords no basis whatsoever for presuming the trial court misunderstood its discretion under section 1203(e).

Even assuming for the sake of analysis the record did establish the trial court misunderstood its discretion under section 1203(e), a remand in this case would still be an idle, unnecessary act. (See *People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1248 [a remand for resentencing is unnecessary when, although the court misunderstood its discretion when it denied probation, it would have been an abuse of discretion to grant probation].) As discussed above, defendant fails to demonstrate the trial court could have found, on the facts present *here*, that this was an unusual case in which the interests of justice would best be served by granting probation. Other case law suggests the standard for determining when a remand is unnecessary is even less stringent than that applied in *Bruce G.* (See *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8 [no remand necessary when the record clearly indicates the court would not have exercised its discretion in defendant's favor even if it had been aware it had such discretion]; *People v. Superior Court (Romero)* 13 Cal.4th 497, 530, fn. 13 [same].) By imposing the midterm three-year on count I as the principal sentence, and a consecutive, three-year enhancement for great bodily injury, and by its statement of reasons for doing so, the trial court demonstrated clearly it would not have granted the defendant probation even if it somehow had the discretion to consider such a disposition.[6]

[6] In arguing the trial court would have granted probation if it understood its discretion to do so, defendant minimizes the significance of the relatively lengthy prison sentence the trial court chose to impose in this case. He points out a court is authorized to grant a defendant probation yet select the aggravated prison term to be imposed for the offense if the defendant violates the terms of his probation. (See *People v. Morado* (1990) 221 Cal.App.3d 890, 894.) But the probation/aggravated sentence combination upheld in *Morado* has little to do with the case before us. The six-year prison sentence here was imposed *unconditionally*, not as an incentive for defendant to succeed on probation. It clearly demonstrates the trial court's belief defendant deserved substantial prison time for his crime, not a chance to prove himself on probation before facing prison.

Because defendant fails to demonstrate a reasonable possibility of a better result had his counsel called the trial court's attention to its discretion under section 1203(e) or argued this was an unusual case warranting a finding of probation eligibility, his ineffective assistance claim also fails. (*People v. Waidla* (2000) 22 Cal.4th 690, 718, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687–696.)

III. DISPOSITION

The judgment is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Banke, J.